Supreme Court, U.S.
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No. 01-663

In The

Supreme Court of the United States

ROBERT L. MONTGOMERY,

Petitioner,

v.

G. RAYMOND TRISLER,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Indiana

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether Robert Montgomery received a *de novo* appellate review of the punitive damages judgment as required by *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 674, 121 S.Ct. 1678, 149 L. Ed. 2d 674 (2001), applying the analytical criteria set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L. Ed. 2d 809 (1996).

PARTIES TO THE PROCEEDINGS AND STATEMENT PURSUANT TO RULE 29.6

Robert L. Montgomery (hereinafter "Montgomery") and G. Raymond Trisler (hereinafter "Trisler") are the only parties remaining in the proceedings before this Court. Two other parties had been joined with Montgomery in the trial court: Executive Builders, Inc., a privately-held corporation owned entirely by Montgomery, Dolores Montgomery, Arthur Sumrall and Alan Zukerman, all of whom are Indiana residents; and Dolores Montgomery, individually.

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JURISDICTION

Montgomery cites 28 U.S.C. § 1257(c) as the basis for jurisdiction of the Petition For Writ Of Certiorari. There is no such statutory provision or citation.

SUMMARY OF RESPONDENT'S ARGUMENT

Although stated under several different guises in the "Questions Presented" section of the Petition For Writ Of Certiorari, Robert Montgomery, now proceeding *pro se*, raises only one claim: that he was entitled to a *de novo* appellate review to determine whether the punitive damages entered against him were justified and appropriate in amount. Montgomery, a non-lawyer, fails to recognize or acknowledge that the Court Of Appeals Of Indiana *did* perform a *de novo* review. That court independently compared the evidence at trial to the criteria set forth by this Court in *BMW of North America v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L. Ed. 2d 809 (1996), and *unanimously* concluded the punitive damages assessment was not only justified by the specific facts of this case, but further expressly determined that "an award of a lesser amount may well have been insufficient to punish Robert [Montgomery] for his conduct and to deter him and others from engaging in such conduct in the future."

The Supreme Court Of Indiana agreed by *unanimously* rejecting Montgomery's plea, after reviewing "the decision of the Court Of Appeals, the Record of Proceedings, the briefs which were filed in the Court Of Appeals, and the materials which were submitted in connection with the request to transfer jurisdiction." Montgomery

has not presented any legal, factual or constitutional basis which would justify additional review by the Supreme Court Of The United States, or any other court, and the Petition For Writ Of Certiorari should be summarily denied.

REASON TO DENY THE PETITION FOR WRIT OF CERTIORARI

MONTGOMERY RECEIVED A CONSTITUTIONALLY VALID JUDICIAL REVIEW OF THE PUNITIVE DAMAGES JUDGMENT

The crux of the Petition For Writ Of Certiorari centers on Montgomery's claim that the punitive damages of $1,640,000.00 are unconstitutionally disproportionate to the compensatory damages of $178,240.00, a ratio of approximately 9 to 1.[1] He argues the Indiana

[1] Montgomery contends the ratio of the punitive damages to the compensatory damages awarded only against him should be calculated as "$1,640,000.00 to $15,000.00, a ratio of 109 to 1. His argument ignores the reality of the events. The financial support and control of the unfounded lawsuit and attack upon Trisler was provided by Montgomery, since Executive Builders was a penniless debt-ridden corporate shell and Dolores Montgomery had a very limited income. These facts were made known to the jury after allocation of the compensatory damages, and during the punitive damages stage. At that stage the jury first became aware of the true financier and choreographer of the attacks upon Trisler, and properly awarded punitive damages against Robert Montgomery which reflected the *total compensatory damages* he had orchestrated against Trisler (a sum exceeding $178,000.00). Under those facts, the Court Of Appeals Of Indiana considered the ratio of punitive to compensatory damages to be "nine to one". (*Executive Builders, Inc. v. Trisler*, 741 N.E.2d 351 at 361 (Ind. App. 2000), *trans. denied.*

courts failed to conduct a constitutionally adequate appellate review to assure the punitive damages were justified and appropriate in amount.[2] The written opinion of the Court Of Appeals Of Indiana reveals the contention by Montgomery is patently incorrect.

This Court established the constitutional requirements for judicial review of punitive damages in two distinct decisions. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 674, 121 S.Ct. 1678, 149 L. Ed. 2d 674 (2001), held that punitive damages judgments are subject to a *de novo*, or independent, review by an appellate court. Such examinations are to be conducted by applying the analytical criteria set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L. Ed. 2d 809 (1996). The *Gore* factors for judicial review of punitive damages were comprehensively discussed and adopted as part of Indiana law in *Ford Motor Company v. Ammerman*, 705 N.E.2d 539 (Ind. App. 1999) at pages 561-562, *trans. denied*, 726 N.E.2d 310, *cert. denied*, ___ U.S. ___, 120 S.Ct. 1424, 146 L. Ed. 2d 315 (2000):

> . . . the *Gore* Court also specifically set forth three "guideposts" to determine whether an award is grossly excessive: (1) the degree of reprehensibility of the conduct at issue, (2) the

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[2] Specifically, Montgomery repeatedly asserts (at least seven times) that the Court Of Appeals Of Indiana employed an "abuse of discretion" standard of review. Yet, nowhere in the entire written opinion of that court is such a phrase used, nor such standard adopted or utilized. Perhaps Montgomery assumed, *incorrectly*, that because the lower court in *Cooper Industries* used an "abuse of discretion" standard, the Indiana appellate courts had also done so.

> disparity between the harm or potential harm suffered by the complaining party and the punitive damages the complaining party received, and (3) the difference between the punitive damages remedy and the civil penalties authorized or imposed in comparable cases. *Id.* at 1598-99. We employ the same test here.

As in *Ammerman*, the Court Of Appeals Of Indiana independently and expressly performed the *Gore* analysis of the punitive damages assessed here against Montgomery, and correctly concluded that the factual circumstances of this case clearly supported the judgment:

> *From the evidence presented at trial*, it is apparent that Robert issued a number of false statements in the complaint against Trisler. Even more compelling, *the evidence* reveals that the true purpose of Executive's causes of action against Trisler was to use the litigation as a sham for asserting false and malicious allegations against him for the purpose of damaging Trisler's integrity and reputation.
>
> Even at trial, Robert answered "you bet" when asked whether he had filed the complaint against Trisler to "shut him up". (R. at 2850). *The evidence* revealed that none of the individuals that Robert had identified as those who decided not to purchase a residence in the subdivision had even heard of Trisler. (R. at 1981-82, 2203). Rather, it was demonstrated that one of the prospective purchasers had retracted his offer when Dolores refused to make good on her promise to perform repairs on one of the units. (R. at 1979-81, 1995-96). Moreover, potential buyers named in several of the discovery documents

did not even exist until after Executive's complaint had been filed. At least one witness testified that he was unaware of anyone who did not purchase the property at Cielo Vista because of Trisler's alleged wrongdoings. (R. at 2163-64).

Additionally, while Robert claimed that Trisler had assaulted him in 1985 by "jabbing him with his forefinger", *the evidence* at trial showed that this incident never occurred. (R. at 3154). A number of other allegations regarding Trisler's "wrongdoings" that Executive alleged in the interference complaint were also shown to be false. (R. at 1967-71). An incident demonstrating intimidation included Robert's pounding on Trisler's front door at 5:30 a.m. on one occasion. (R. at 3165, 3261-62, 3546). Further, Dolores falsely reported to the Board of Directors of the Association that Trisler had stolen property and referred to Trisler in her deposition as "slime and disease". (R. at 2992).

In reviewing the evidence that was presented at trial, it is apparent that Robert and Dolores engaged in a personal crusade throughout the pendency of this action which was designed to intentionally and maliciously destroy Trisler's reputation and peace of mind. *The evidence overwhelmingly demonstrated that Robert and Dolores acted maliciously toward Trisler.* (Emphasis added).

Executive Builders, Inc. v. Trisler, 741 N.E.2d 351 at 359 (Ind. Ct. App. 2000), *trans. denied.*

* * *

In the instant case, Trisler testified that Executive's cause of action resulted in nearly six years of sleeplessness, mental anguish, depression

and nervousness. (R. at 3531). Trisler was frightened by Robert's actions and he believed that his neighbors and co-owners placed blame on him for the dispute that the Montgomerys had publicized. As set forth above, *the evidence at trial demonstrated that Robert purposely and maliciously orchestrated and financed a false and frivolous cause of action against Trisler. Robert also conducted other public attacks on Trisler in an effort to ruin Trisler's reputation and standing within his own community and neighborhood.* As a result, we cannot say that the award of punitive damages was error.

With respect to the amount of punitive damages that were awarded, we note that the ratio of those damages to compensatory damages was approximately nine to one. Contrary to Executive's claim, such an award is not error. In *Emerson v. Markle*, 539 N.E.2d at 40-41, we determined that a punitive damage award which was 150 times larger than the actual damage award was not excessive. *Just as the facts show here,* the *Emerson* case involved *a personal crusade on the part of the defendant which was designed to intentionally and maliciously destroy an individual's reputation, peace of mind, and career. Id.* at 40. Here the jury heard evidence that Robert's economic wealth amounted to at least $16 million. The punitive damage award was approximately 10% of that amount. Thus, *it can hardly be said that leaving Robert with 90% of his wealth is oppressive in light of his conduct and attempts to destroy Trisler in a number of ways. An award of a lesser amount may well have been insufficient to punish Robert for his conduct and to deter him* and others from engaging in such conduct in the future. (Emphasis added).

Executive Builders, Inc. v. Trisler, 741 N.E.2d 351 at 360-361 (Ind. Ct. App. 2000), *trans. denied.*

As stated in *Gore*: " . . . infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty." *Id.* at 517 U.S. 576, 116 S.Ct. 1599. Prior Indiana decisions involving cases of personalized attacks on innocent targets have affirmed ratios of punitive damages to compensatory damages of 150 ($150,000.00) to 1 ($1,000.00), *Emerson v. Markle*, 539 N.E.2d 35 (Ind. App. 1989); and 68 ($750,000.00) to 1 ($11,000.00), *Archem, Inc. v. Simo*, 549 N.E.2d 1054 (Ind. App. 1990).[3] *Emerson* "involved a personal crusade designed to intentionally and maliciously destroy a man's reputation, peace of mind, and career." *Id.* at 40. In *Archem* the defendant "was determined to ruin Simo's sales prospects by refusing to supply him and by sending personnel into Simo's territory to lure his customers away, all in an attempt to coerce him into signing an exclusive, five-year contract with Archem." *Id.* at 1061. Montgomery's conduct in the case at bar was certainly no less egregious than existed in *Emerson* and

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[3] Montgomery briefly mentions that the punitive damages against him should be limited by Indiana's current statute which "caps" such damages. Indiana Code § 34-57-3-4. However, Indiana law does not permit retroactive application of statutory provisions in the absence of a specific legislative directive to do so, as noted by the Court Of Appeals Of Indiana herein: "This statute, which became effective on July 1, 1998, does not apply to this cause, inasmuch as the litigation commenced in 1987, prior to its enactment. The legislature did not see fit to make this statute retroactive. Therefore, Trisler's recovery is not limited under the provisions of this statute."

Archem, and is at least equally deserving of similarly substantial punitive damages.

Clearly, Montgomery received a full and independent *de novo* appellate review of the punitive damages assessment by the Court Of Appeals Of Indiana pursuant to the standards outlined in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc., supra*, and applying the criteria mandated by *BMW of North America v. Gore, supra*. Such appellate examination not only affirmed the punitive damages judgment, but also expressly concluded that "an award of a lesser amount may well have been insufficient to punish Robert for his conduct and to deter him and others in engaging from such conduct in the future." The Supreme Court Of Indiana accepted that *de novo* review by denying transfer. The denial did not require a *second de novo* review, no more than this court would be required to do so before rejecting the Petition For Writ Of Certiorari.

United States Supreme Court Rule 10 provides that a "review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons." No "compelling reasons" exist here, where constitutional compliance has occurred in the preceding appellate review process. Montgomery has failed to demonstrate any basis for relief by this Court, and the Petition For Writ Of Certiorari should be summarily denied.

CORRECTION AND CLARIFICATION OF MISSTATEMENTS AND OMISSIONS IN THE PETITION FOR WRIT OF CERTIORARI

A number of misstatements and omissions are contained in Montgomery's Petition For Writ Of Certiorari, which thereby incorrectly portray the events of the litigation and the proceedings in the lower courts. For example, Montgomery refers repeatedly to a defense of "advice of counsel" (which was thoroughly addressed and rejected by the Court Of Appeals Of Indiana in the written opinion), and asserts that Trisler did not suffer any compensable injuries or damages. While those unfounded contentions are applicable only to the unchallenged compensatory damages awarded and do not alter the fact that Montgomery received a proper *de novo* appellate review of the punitive damages assessment (thereby negating any entitlement to a writ of certiorari herein), United States Supreme Court Rule 15.2 states:

> In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

In compliance with the obligation imposed by Rule 15.2, Trisler offers the following comprehensive re-statement

of the procedural history and factual background which occurred in the courts below.

PROCEDURAL HISTORY

In December, 1987, Executive Builders, Inc. filed a "Complaint For Intentional Interference With Business" (hereinafter "Interference Complaint") against Trisler. (R., pp. 1890-1903). In February, 1989, Trisler filed an Amended Answer to the Interference Complaint, as well as a Counterclaim against Executive Builders and a Third-Party Complaint against Robert Montgomery and Dolores Montgomery. (R., pp. 80-91). In March, 1990, Trisler filed an Amended Counter-Claim And Third-Party Complaint against Executive Builders, Robert Montgomery, and Dolores Montgomery which consisted of seven "counts" under theories of defamation (Count I), invasion of privacy (Count II), abuse of civil process (Count III), intimidation (Count IV), deception and mischief (Count V), breach of fiduciary duties (Count VI), and malicious prosecution and frivolous litigation (Count VII). The pleading included a prayer for both compensatory and punitive damages. (R., pp. 517-532).

The trial court entered Findings Of Fact, Conclusions Of Law And Judgment on the Interference Complaint in February, 1990, granting Summary Judgment in favor of Trisler and against Executive Builders. (R., pp. 1967-1972). Executive Builders then filed a "Motion To Vacate Court's Judgment Entry Of February 21, 1990 And To Correct Errors" (R., pp. 533-545), which was automatically deemed to be judicially denied by Indiana Trial

Rule 53.1 in April, 1991. However, in March, 1994, the trial court "granted" the motion and vacated the Summary Judgment of February 21, 1990. (R., p. 22). Trisler then appealed, and in March, 1995, the Court Of Appeals Of Indiana reversed the trial court and remanded the cause of action *"with instructions to reinstate its findings, conclusions and judgment entered on February 21, 1990 in favor of Trisler"*. *Trisler v. Executive Builders, Inc.*, 647 N.E.2d 390 at 394 (Ind. App. 1995), *trans. denied.*

The Counterclaim And Third-Party Complaint of Trisler finally proceeded to trial against Executive Builders,[4] Robert Montgomery[5] and Dolores Montgomery[6] beginning in June, 1999. By Order of the trial court, the issues of compensatory damages and punitive damages were bifurcated for trial. On July 7, 1999, the jury returned verdicts awarding compensatory damages in favor of Trisler and against Executive Builders in the amount of $143,240.00 (R., p. 1620), against Robert Montgomery in the sum of $15,000.00 (R., p. 1619), and against Dolores Montgomery in the amount of $20,000.00 (R., p. 1618), for a total of $178,240.00 in compensatory damages. Following these initial verdicts, the trial court instructed the jury to return the next afternoon for the punitive damage stage of the trial. (R., p. 3885).

During the punitive damages phase of the trial, the uncontroverted evidence was that Robert Montgomery's

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[4] Counts I, II and IV against Executive Builders were previously dismissed by the trial court.

[5] All Counts remained against Robert Montgomery.

[6] Count I against Dolores Montgomery was previously dismissed by the trial court.

assets were in excess of $16 million dollars (R., pp. 3902-3953), the "wealth" of Executive Builders was in a negative amount of hundreds of thousands of dollars (R., p. 3907), and Dolores Montgomery's annual income was $15,000.00 per year. (R., p. 3950). The jury then returned a verdict awarding punitive damages against Robert Montgomery in the sum of $1,640,000.00 (R., p. 1623), and no punitive damages against Executive Builders or Dolores Montgomery. (R., pp. 1622, 1624).

The following day, Robert Montgomery filed a Motion To Vacate Jury Award Of Damages Against Robert L. Montgomery (R., p. 46), and in August, 1999, Executive Builders, Robert Montgomery and Dolores Montgomery filed "Defendants' Motion To Reject Jury Verdict; To Declare A Mistrial; And For Entry Of Summary Judgment On The Evidence". (R., pp. 1588-1598). These motions were considered and denied by the trial court in October, 1999 (R., p. 47), and Judgment identical to the jury verdicts was entered. (R., pp. 1689-1690). In November, 1999, Executive Builders, Robert Montgomery and Dolores Montgomery filed Defendants' Motion To Correct Errors (R., pp. 1691-1707), which was denied by the trial court in December, 1999. (R., pp. 1747-1748).

On appeal, the Court Of Appeals Of Indiana, by *unanimous* opinion of a three-member panel, affirmed the trial court judgment in December, 2000. *Executive Builders, Inc. v. Trisler*, 741 N.E.2d 351 (Ind. App. 2000), *trans. denied*. A subsequent Petition For Rehearing was denied by that same court in January, 2001. In February, 2001, Robert Montgomery filed a Petition To Transfer to the Supreme Court Of Indiana, the state's highest court. The five justices of that court *unanimously* denied the Petition

To Transfer in July, 2001, thereby allowing the decision of the Court Of Appeals Of Indiana to stand unchanged. Thereafter, in direct contravention of the explicit provisions of the Indiana Rules Of Appellate Procedure, Montgomery filed a "Motion To Waive Appellate Rule 58(B) And To Permit Filing Of Appellant's Motion To Reconsider Denial Of Transfer". That "motion" was denied by the Supreme Court Of Indiana in August, 2001.

Montgomery has now filed a Petition For Writ Of Certiorari with this Court.

FACTUAL BACKGROUND

At some time prior to August, 1983, Greenwood Development Corporation began to develop a 60-lot residential subdivision known as Cielo Vista in Greenwood, Indiana. (R., p. 1967). Greenwood Development Corporation subsequently experienced financial difficulties, and the Cielo Vista property was repossessed by Union Federal Savings & Loan Association (hereinafter "Union Federal"). (R., p. 1967). In June, 1985, Executive Builders (partially consisting of Robert Montgomery and Dolores Montgomery) purchased the Cielo Vista property from Union Federal. (R., pp. 1967, 2080-2081). At the time of purchase by Executive Builders, at least 17 of the original 60 lots had been sold. (R., p. 8969). Trisler was the owner of three of those 17 units, which he rented to others. (R., pp. 3133-3135).

In March, 1986, an "organizational meeting" was conducted for purposes of forming the Cielo Vista Community Association (hereinafter "CVCA"), a governing

entity provided for by the covenants and by-laws of the Cielo Vista residential community. (R., pp. 3428-3432). Montgomery, self-appointed "Chairman" of the CVCA due to his status as a member of Executive Builders, named himself and fellow Executive Builders members Dolores Montgomery and Alan Zukerman to three-year terms on the CVCA Board Of Directors. (R., p. 3429).

In May, 1986, the CVCA placed a "special assessment" for "repairs" against the original 17 unit owners, including Trisler. (R., p. 2472). Later, in June, 1987, the CVCA also attempted to place liens against the original 17 units on the basis of "unpaid" regular monthly assessments for the period between 1980 and 1985 (prior to the purchase by Executive Builders). (R., p. 2474). Trisler, believing the two charges were improper, consulted with an attorney in 1987. (R., pp. 2472, 3161). The attorney determined that the CVCA Board Of Directors had been improperly appointed, rather than elected, and that Executive Builders owed CVCA thousands of dollars. (R., p. 2476). The attorney, who believed litigation could be avoided if a properly elected Board Of Directors could be established and the improper liens and assessments were removed, then sent a letter notifying the homeowners that a meeting would be held to "avoid this litigation by resolving the matter directly with you, the homeowners, who are the Association." (R., p. 2467).

In response, Robert Montgomery sent a letter to "All Homeowners" in November, 1987, accusing Trisler of desiring to "keep him and his friends in the rental property business and to protect their investments at your expense." (R., pp. 2832-2833). Notably, Trisler had received no prior complaints about renting his units, nor

had he ever previously been accused of being a troublemaker. (R., pp. 3163-3164). The letter also stated: "If the Trisler group is sincere, let them take their concerns to court where they belong".

When the December, 1987 homeowners meeting with Trisler's attorney went forward as planned, Robert Montgomery sent a second letter to the homeowners, stating among other things that Trisler "would just as soon turn this community into a slum rental project" and that "we have landlords among us and the greed that goes with profits." (R., pp. 2862-2863). Again, Robert Montgomery invited Trisler to "put up [Trisler's] nickel and take [Trisler's] chances in a court of law" and "I challenge . . . Mr. Trisler and these mighty wizards of the law . . . to take me to court. . . . " (R., p. 2863). The letters disturbed Trisler, causing him to believe his neighbors would see him as a troublemaker, and that he would lose their respect as a result of the statements of Robert Montgomery. (R., p. 3165).

Shortly thereafter, Robert Montgomery, using Executive Builders as a front to silence Trisler, authorized and signed the Interference Complaint filed in the name of Executive Builders in December, 1987. (R., pp. 57-63). The Interference Complaint requested damages against Trisler in the amount of $250,000.00 compensatory and $750,000.00 punitive, for a total sum of $1,000,000.00. As finally acknowledged by Montgomery at trial, the true purpose of the lawsuit was not to recover for any intentional interference with the business of Executive Builders, but was instead to keep Trisler quiet (R., p. 2850):

Q: You, you filed this Complaint to shut him up?

A: You bet.

That is the precise method which Executive Builders had previously decided to use if Trisler proved to be uncooperative with their plans. In October, 1985, Alan Zukerman of Executive Builders had met with Trisler to discuss some of Trisler's early concerns, which conference was memorialized in a memorandum from Zukerman to Robert Montgomery (R., pp. 2092-2094), where Zukerman concluded and recommended:

> I really feel that Trisler will continue to be impossible to work with.
>
> * * *
>
> I don't think at any time he will be super cooperative. I would suggest that we buy Ray Trisler's condominium and get him out of the area. . . . The final solution would be to take him to court.

The fact that the Interference Complaint was totally unfounded and was instead designed solely to intimidate and coerce Trisler by forcing him to face the expense and stress of a malicious lawsuit was clear when it was established that the contents of the Interference Complaint were fabricated. For example:

1. When asked to identify all persons who decided not to purchase a home in Cielo Vista due to the alleged acts or conduct of interference by Trisler (R., p. 1933), the Answers To Interrogatories signed with Robert Montgomery's input identified "James Norseick, O. Charles Crawford and William and Marilyn McCullough". (R., p.

1964). In point of fact, *not one* of those potential buyers knew Trisler (R., pp. 1981, 1996, 2202), had ever talked to Trisler (R., p. 3151), had any contact with Trisler (R., pp. 1981, 2203-2204), or had ever even heard of Trisler (R., pp. 1981-1982, 2203), and all who could be located stated Trisler was not a factor in their decision not to buy. (R., pp. 1982, 1988-1989, 2205).

The McCulloughs executed Affidavits setting forth those very facts in 1989 (R., pp. 1985-1986), as did O. Charles Crawford in 1989 (R., pp. 2229-2230), and each reiterated the accuracy of the Affidavits at trial. (R., pp. 1983-1986, 1995). The McCulloughs retracted their offer when Dolores Montgomery did not make repairs which were promised (R., pp. 1979-1981, 1995-1996), and Crawford decided not to buy because of other financial problems. (R., p. 2202). Furthermore, Alan Zukerman, the representative on behalf of Executive Builders at trial, admitted there was no evidence to contradict the statements of the McCulloughs. (R., p. 2096). Moreover, the McCulloughs and Crawford had previously conveyed to the Montgomerys the reasons why they had decided not to complete the purchases at Cielo Vista, and thus the Montgomerys *knew* such reasons were unrelated to Trisler. (R., pp. 1988-1989). Finally, the McCulloughs and Crawford did not even begin purchase negotiations until March, 1988, four months *after* the so-called "Interference Complaint" was filed. (R., pp. 1989-1990, 2226, 3001-3002, 3012). Thus, the very people identified by the Montgomerys as the individuals with whom Trisler "interfered" as the *basis* for the lawsuit weren't even potential buyers at the time the Interference Complaint was filed!

As for James Norseick, Dolores Montgomery contended at trial that, in truth, he was entirely fictitious and had been fabricated by an Executive Builders employee.[7] She claimed to have discovered the fabrication in 1989 but never reported it to counsel for Trisler. (R., pp. 3005-3006).

However, earlier, by way of deposition, Dolores Montgomery had sworn under oath that Joe Thomas, the father of Trisler's Attorney, had spoken to James Norseick and instructed him not to buy at Cielo Vista. (R., pp. 2203-2204). That contention was expressly rejected by Joe Thomas in an Affidavit in May, 1989, in which he denied knowledge of James Norseick and stated he never told anyone not to purchase at Cielo Vista, and especially never said so on behalf of Trisler. (R., pp. 2035-2036).

It is clear Montgomery had no basis whatsoever to identify James Norseick as a potential purchaser who changed his mind due to any conduct or activity by Trisler. Alan Zukerman, the representative for Executive Builders at trial, admitted that even after twelve years of litigation he is not aware of anyone who decided not to buy property at Cielo Vista because of perceived problems with the homeowners association or with Ray Trisler. (R., pp. 2163-2164).

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[7] Before accepting Dolores Montgomery's testimony that James Norseick never existed, it should be noted that Robert Montgomery testified he believes he talked to James Norseick on the telephone. (R., p. 2816). Also, Susan Spivey, the secretary for Executive Builders (R., p. 2264), testified by deposition she had met James Norseick (R., p. 2275) and had spoken to him several times. (R., p. 2276).

2. The Montgomerys were asked by Interrogatory to identify acts of conspiracy by Trisler, as alleged in their Interference Complaint. (R., p. 1942). They alleged in their Answers To Interrogatories that Trisler told Greenwood city officials he was the Architectural Control Committee for Cielo Vista, and that Trisler's statement delayed the Montgomery's attempts to secure foundation releases to begin building. (R., p. 1045). Trisler denied those allegations (R., pp. 3107-3137), and George Ruddick, the Building Commissioner for the City of Greenwood (R., p. 2003), and Clint Ferguson, the Director Of Planning Zoning And Economic Development And Resources for the City of Greenwood (R., p. 2039), both testified in opposition to the Montgomery allegations. Ruddick and Ferguson stated that Architectural Control authorization has to be in writing (R., pp. 2006-2007, 2054), that Trisler had filed no such written document (R., pp. 2008, 2053), nor had Trisler otherwise represented himself to be authorized by Cielo Vista to do so. (R., pp. 2023-2024). Ruddick and Ferguson had previously executed Affidavits, in 1989 (R., pp. 2016-2019, 2045-2050), setting forth that very same testimony.[8] And, as with the other witnesses, Alan Zukerman admitted, as the representative for Executive Builders at trial, that he had no

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[8] As the trial date approached in 1999, the Montgomerys attempted to influence Ruddick and Ferguson as witnesses by asking the Johnson County Prosecutors Office, two months before trial, to pursue charges against the two witnesses for allegedly knowingly signing "false and fraudulent Affidavits" in 1989. (R., pp. 2025, 2995). Dolores Montgomery also, in that same time frame, attended a Greenwood City Council meeting and publicly accused Ruddick and Ferguson of signing false Affidavits.

evidence to contradict Ruddick and Ferguson. (R., p. 2108).

3. In the Interference Complaint, Trisler was accused of instructing Joe Kern, a fellow homeowner at Cielo Vista, to file a false CVCA annual report with the Indiana Secretary Of State. (R., pp. 1898, 3503). Trisler denied that allegation (R., p. 3149), and Joe Kern stated, by Interrogatory Answers admitted into evidence, that he *unilaterally* undertook to update the annual reports with the Secretary Of State. (R., p. 2327). Furthermore, Joe Kern also testified that in December, 1985, two years before the Interference Complaint was filed, and after being accused by Dolores Montgomery of committing a crime, he authorized Montgomery "to make whatever corrections are necessary in the annual Secretary Of State's Record for the Cielo Vista Community Association, Inc.". (R., pp. 2745, 2767).

4. In the Interference Complaint, it was alleged that Trisler assaulted Robert Montgomery in May, 1985, "by jabbing Montgomery with his forefinger in the shoulder in a rude and offensive manner." (R., p. 1987). In truth, such an incident never occurred, as the trial court specifically found when it entered Summary Judgment in favor of Trisler on the Interference Complaint. (R., p. 3154).

5. The Montgomerys were by Interrogatory to identify how the letter from Trisler's attorney had decreased property values (R., pp. 1923-1924), as alleged in the Interference Complaint. (R., p. 1899). Montgomery responded (R., p. 1953):

> Because of the interference of Raymond Trisler and his co-conspirators, Railroadmans Federal Savings & Loan Association, who previously was our key source of mortgage money informed our previous buyers through Kaye Vahle that Cielo Vista property values were declining because people do not want to buy into a lawsuit and they were no longer interested in giving anybody a mortgage on property located at Cielo Vista.
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> * * *
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> Doris Bird told Luann Hiatt that Executive Builders was (in substance) "an unscrupulous company" and that the Cielo Vista property values were going down . . .

The *only* lawsuit pending at the time of Railroadmans' was litigation which had been initiated *by Executive Builders* against Union Federal (and not any lawsuit by Trisler), which fact Montgomery knew and explicitly noted in his correspondence to Railroadmans Savings & Loan Association on December 11, 1987 (the same day Executive Builders filed suit against Trisler):

> . . . Kaye Vahle [a loan originator for Railroadmans] has commented that properties in Cielo Vista will be hard to sell, *and that the lawsuit filed against Union Federal* would result in no lending institution touching Cielo Vista condos for financing in the near future, if somebody wanted to sell their unit. (Emphasis added).

In short, even as Montgomery signed and filed the lawsuit against Trisler, he knew that any claim of decreased property values, or questions about the integrity of Executive Builders, came from other people or entities, and

not from Trisler. Montgomery also later admitted that the statement by Doris Bird regarding the reputation of Executive Builders, was "picked up from Railroadman's", not from Trisler. (R., p. 2808).

As to the many other vague general allegations in the Interference Complaint pertaining to Trisler's alleged failure to turn over certain documents, or his consultation with attorneys or other homeowners about the propriety of the assessments placed upon his property, the trial court properly and specifically found those to be neither unlawful nor wrongful, nor constituting an interference with the business of Executive Builders or Montgomery. (R., pp. 1967-1971).

Clearly, Montgomery could never expect to prevail on the Interference Complaint when there was no evidence upon which he could support *any* of his claims. Rather, the actual purpose of the lawsuit was to use the litigation, and its costs to Trisler, as a front for asserting false and malicious allegations against Trisler, to be distributed and seen by his CVCA co-members, neighbors and friends,[9] in order to damage his integrity and

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[9] Although Montgomery testified the Interference Complaint was made available for review by the CVCA members, he could not state that he had similarly sent a copy of the trial court's Order, granting Summary Judgment in favor of Trisler, nor copies of the decision of the appellate courts which reinstated such Summary Judgment. As a result, after six years of stress, fear and effort to dispose of the Interference Complaint lawsuit against him, Trisler was still denied the same publicity for his exoneration as was used by Montgomery to vilify him. Consequently, he could not hope to recoup his reputation and esteem in the eyes of his fellow Cielo Vista homeowners and neighbors.

reputation. (R., p. 2873). It was Montgomery's hope that the expense of the lawsuit, and the social pressure generated by placing Trisler's standing in the community at stake, would "get him out of the area" as previously suggested by Alan Zukerman, and "shut him up" as Montgomery intended.

But Montgomery did not stop with the mere filing of the Interference Complaint. In January, 1998, more correspondence was sent by Montgomery to "all homeowners" (R., pp. 2867-2868) referring to "the unpleasantness that was originally initiated by . . . Mr. Trisler", noting that "they [Trisler] will now have to pay their own legal expenses as well as the Association's litigation expense."[10] And while at the same time the lawsuit was pursued against Trisler for supposedly destroying the property values in Cielo Vista, Montgomery's correspondence declared "our property values keep going up."

Likewise, in February, 1988, the purported minutes of the annual meeting of the CVCA, held in June, 1987, were typed and distributed to the homeowners. (R., pp. 2843, 2852-2855). Dolores Montgomery was responsible for the contents of all such newsletters to the homeowners. (R., p. 2280). Robert Montgomery, a multi-millionaire, claimed the minutes had not been previously transcribed,

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[10] The Montgomerys are well aware of the expense of litigation, having spearheaded a lawsuit by the CVCA against State Farm Insurance Company (R., p. 2925), and the lawsuit against Union Federal in which compensatory damages were sought in the amount of $325,000.00, and punitive damages in the sum of $975,000.00, for a total of $1,300,000.00. (R., p. 2939). Dolores Montgomery testified at least 34 lawsuits arose from the Cielo Vista project. (R., pp. 3026-3027).

"because we had no money." (R., p. 2848). In any event, the 1988 newsletter repeatedly referred to Trisler (and only Trisler) in a derogatory and unfavorable light, sometimes with unsubstantiated direct quotations. (R., pp. 2852-2856).

Montgomery sent more correspondence to the homeowners in June, 1988 (R., p. 2884), where he continued against "Trisler . . . as landlord", stating: "we still have a problem with the landlords who want to continue operating their seven units without regard to their obligation to the Homeowners Association or for the health and safety to whom they rent their units." Yet, Montgomery reiterated: "I am sure that you'll be pleased to hear the property value has continued to go up." (R., p. 2884).

In addition, Montgomery utilized a pattern of intimidation, coercion and malice throughout discovery proceedings in the lawsuit. For example, during the deposition of Dolores Montgomery, at which Trisler was in attendance, Robert Montgomery telephoned his secretary, Susan Spivey, and instructed her to call Eli Lilly Company, Trisler's employer, to inquire as to his whereabouts to see if he was "playing hooky from work". (R., pp. 2266-2267, 3018, 3020). Spivey did so, and was told Trisler was in a seminar, which Spivey reported to Montgomery, who then held up the note from the telephone conversation and said to Trisler "I gotcha". (R., pp. 2268-2269, 3019). These actions caused Trisler to fear he could lose his job. (R., p. 3170).

Other acts of intimidation included Montgomery violently pounding on Trisler's door at 5:30 a.m., frightening Trisler and his family. (R., pp. 3167, 3261-3262, 3546).

Dolores Montgomery falsely told the Board Of Directors of CVCA that Trisler stole property (R., p. 3032), which statement was expected to be reported to all 60 homeowners. (R., p. 3033). Also, the Montgomerys began to assemble a personal file on Trisler (R., pp. 3022-3023), including criminal records which were illegally obtained. (R., p. 3023). Dolores Montgomery then showed the personal file to Zukerman and Arthur Sumrall, principals of Executive Builders. (R., pp. 2122-2123, 3023). Dolores Montgomery further exhibited the extent of the Montgomerys' animosity and malice toward Trisler by referring to Trisler in her deposition as "slime", a "disease", and a "fever". (R., p. 2992).

CONCLUSION

The jury determined Trisler had been harmed to the extent of $178,240.00 in compensatory damages (contrary to Montgomery's attempts to paint the wrongful conduct as essentially harmless). When the jury subsequently learned in punitive damages stage of the trial that Robert Montgomery was the only defendant who had the financial resources and wherewithal to support the malicious litigation and the wrongful attempts to destroy Trisler socially, financially and emotionally, that same jury properly entered appropriate and justified punitive damages against Montgomery in the sum of $1,640,000.00.

Contrary to Montgomery's assertions, the Court Of Appeals Of Indiana did not review the punitive damages assessment under an "abuse of discretion" standard. Rather, those damages were subjected to a full, thorough

and independent *de novo* consideration as required by *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 674, 121 S.Ct. 1678, 149 L. Ed. 2d 674 (2001), applying the analytical criteria set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L. Ed. 2d 809 (1996). At the conclusion of the *de novo* review, the three member panel of the Court Of Appeals Of Indiana *unanimously* affirmed the punitive damages judgment and declared that "an award of a lesser amount may well have been insufficient to punish Robert for his conduct and to deter him and others from engaging in such conduct in the future". All five Justices of the Supreme Court Of Indiana *unanimously* agreed to deny transfer, refusing to alter the judgment or the content of the written opinion of the Court Of Appeals Of Indiana.

The proceedings in the Indiana appellate courts have complied with all constitutional requirements and guideposts. The punitive damages assessed against Montgomery were justified and appropriate in amount. Montgomery is not entitled to a further review or consideration by this honorable Court, or by any other court.

WHEREFORE, for all of those reasons set forth above, G. Raymond Trisler respectfully prays this Court to deny the Petition For Writ Of Certiorari filed by Robert Montgomery, and for all other just and proper relief in the premises.

Respectfully submitted,

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